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No. 91-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

METRO-NORTH COMMUTER RAILROAD COMPANY,

*Petitioner,*

vs.

JOHN TEAHAN,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Metro-North Commuter Railroad ("Metro-North") terminated the employment of respondent John Teahan who was excessively absent from work because of his addiction to alcohol and drugs. Teahan underwent treatment for his alcohol and drug addiction prior to the date that disciplinary proceedings required under his collective bargaining agreement to effect termination of his employment were completed. Because he claims to have been rehabilitated at the time his employment was actually terminated, Teahan asserts that Metro-North violated Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against the handicapped. The decision reversing the grant of summary judgment to Metro-North and remanding the case for trial raises the following questions:

1. Whether the exclusion of an employee "who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question" from the definition of "individuals with handicaps" in Section 504 means that the employee's current use of alcohol is to be assessed when the employee fails to perform those duties or when the employer actually terminates his employment?

2. Whether the "otherwise qualified" determination to be made in assessing whether a handicapped person is entitled to the protection of Section 504 is to be made as of the time the employee commits disciplinary offenses or whether it is to be made as of the actual date the employer terminates the employment relationship?

## LIST OF PARTIES

The Petitioner in this action is Metro-North Commuter Railroad Company, which is a subsidiary of the Metropolitan Transportation Authority.

The Respondent in this action is John Teahan.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Metro-North Commuter Railroad Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered January 31, 1992.

### OPINIONS BELOW

The District Court's opinion is not reported (S.D.N.Y. March 29, 1991). The Court of Appeals' opinion is reported at 951 F.2d 511 (2d Cir. 1991).

## JURISDICTION

The opinion of the Court of Appeals was filed on December 27, 1991, and judgment was entered on January 31, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

29 U.S.C. §706(8) (1990).
29 U.S.C. §794 (1990).

## STATEMENT OF THE CASE

Respondent John Teahan brought this action under the Rehabilitation Act of 1973, 29 U.S.C. §791, *et seq.* ("Rehabilitation Act"), to challenge his dismissal on April 11, 1988 from the employ of petitioner Metro-North Commuter Railroad Company ("Metro-North"), which, as a recipient of federal financial assistance, is subject to Section 504 of the Rehabilitation Act, 29 U.S.C. §794.

Teahan had worked for Metro-North in the "safety-sensitive" position of telephone and telegraph maintainer, *see Burka v. New York City Transit Authority*, 739 F. Supp. 814, 825 (S.D.N.Y. 1990), from Metro-North's inception in 1983. Pursuant to Section 2 of the Railway Labor Act, 45 U.S.C. §152 ("RLA"), the rates of pay, rules and working conditions of his employment were governed by a collective bargaining agreement between Metro-North and the International Brotherhood of Electrical Workers ("IBEW"), the designated representative of Teahan's craft.

During the five-year period 1983-87, Teahan's absenteeism was, by his own admission, excessive, and, during this time, he was, by his own admission, an unrehabilitated alcoholic and drug addict. He incurred 19 unauthorized absences in 1984 and 47 in 1985. (A3)[1] In early 1986, he entered a 30-day rehabilitation program at Parkview Hospital in Yorktown Heights, New

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[1] References to "A__" are to the Court of Appeals' opinion, reproduced in Appendix A to this Petition.

York, but he quickly relapsed, incurring 58 unauthorized absences in 1986 and 53 in 1987. (A3) His supervisors progressively disciplined him with warning letters, record suspensions and actual suspensions for his unauthorized absences. (A3) On December 28, 1987, after he had incurred unauthorized absences on December 10-11 and December 17-18, 1987, his supervisor commenced formal disciplinary proceedings to dismiss him. Before receiving official notice of the disciplinary charge, Teahan informed his supervisors of his substance abuse problem and entered an in-patient rehabilitation program at Conifer Park Rehabilitation Center in Scotia, New York, which he completed about one month later. (A3-4) As required under the IBEW agreement, Metro-North returned Teahan to work on January 28, 1988 following his release from that program and pending final disposition of the disciplinary proceedings mandated by that agreement. (A4)

On April 11, 1988, some 10 weeks after Teahan's return to work and following the completion of disciplinary proceedings conducted pursuant to the IBEW agreement, Metro-North dismissed him. (A4) The IBEW appealed the dismissal to the special board of adjustment established by the IBEW and Metro-North pursuant to Section 3 of the RLA, 45 U.S.C. §153 Second. The board, chaired by a neutral arbitrator, denied the claim, finding "no doubt" that Teahan's record "constitute[d] excessive absenteeism, and [that] such conduct is of course particularly detrimental to the Carrier in the railroad industry." (E2)[2] The board rejected the IBEW's appeals for leniency on Teahan's behalf, finding that his "previous record [was] not supportive of any request for leniency and certainly cannot mitigate the sanction imposed." (E2)

Teahan then commenced this action, claiming that Metro-North had unlawfully discriminated against him because of a handicap in violation of the Rehabilitation Act.

Metro-North moved for summary judgment, arguing that Teahan could not make out a *prima facie* case of discrimination

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[2] References to "E____" are to Award No. 114 of Special Board of Adjustment No. 934, reproduced in Appendix E to this petition.

under Section 504: (1) because at the time he incurred the absences for which Metro-North terminated his employment, Teahan did not come within the definition of "individuals with handicaps" in Section 706(8) as his admitted substance abuse prevented him "from performing the duties of the job in question"[3]; (2) because his admittedly excessive absenteeism rendered him not "otherwise qualified" within the meaning of Section 504; and (3) because he could not show he had been discriminated against "solely by reason of . . . his handicap" within the meaning of Section 504.

In granting Metro-North's motion, the District Court: (1) declined to construe the word "current" in Section 706(8) but found a question of material fact as to whether Teahan was rehabilitated and within the protection of Section 504 at the date of his dismissal (C6)[4]; (2) found a question of material fact as to whether Teahan was "otherwise qualified" at the date of his dismissal (C6-7); and (3) apparently assuming that Teahan had made out a *prima facie* case, held that Metro-North had presented a legitimate, nondiscriminatory reason for its action – Teahan's excessive absenteeism – which he had failed to rebut with any evidence of discrimination. (C7-9)

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[3] At the time Metro-North terminated Teahan's employment, Section 706(8) provided:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, such term ["individuals with handicaps"] does not include any individual who is an alcoholic or drug user whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. §706(8)(B)(1986). The 1990 amendment to Section 706, reproduced in Appendix D to this Petition (D1), which resulted in different sections covering users of illegal drugs and alcoholics, makes no substantive difference to the analysis. (*See* A18-19.)

[4] References to "C____" are to the District Court's opinion, reproduced in Appendix C to this Petition.

On appeal, the Second Circuit Court of Appeals reversed and remanded, holding: (1) the question whether the employer discriminated solely by reason of a handicap is to be answered in the affirmative if the employer acted on the basis of behavior which plaintiff can prove is causally attributable to the handicap (A12-13); (2) the question whether an employee's substance abuse is "current" is a question of fact to be determined as of the actual date of termination, not as of the time of his disciplinary infractions or as of the time of the employer's initiation of disciplinary proceedings against him (A18-19); and (3) the question whether an employee is "otherwise qualified" is a question of fact to be determined as of the actual date of his termination, with his past disciplinary record being only one of several factors the District Court is to take into account. (A20-21)

## REASONS FOR GRANTING THE WRIT

This petition seeks review only of the Court of Appeals' holdings that the relevant date for the determination of the questions whether an employee's alcoholism is "current" and whether he is "otherwise qualified" is the date of the actual termination of his employment. We do not ask the Court to review the Court of Appeals' holding as to the causation element of the *prima facie* case under Section 504.

### I. The Court of Appeals' Decision Upsets the Carefully-Crafted Scheme of the Rehabilitation Act and Raises Issues of Vital Importance to Section 504 (and Section 503) Employers.

The Court of Appeals' holdings that an employer must determine (i) whether an employee is a "current" alcoholic and (ii) whether the employee is "otherwise qualified" as of the effective date of the employee's termination flout both the commonsense meanings of Section 706(8) and Section 504, respectively, when applied to an already existing employment relationship, and Congress' intent as to an employer's ability to discipline an employee whose alcoholism results in unquestionably unacceptable performance.

The Court of Appeals decided two important questions of law which have not been but should be decided by this Court to clarify employers' Section 504 (and other) liability to employees who are unrehabilitated substance abusers at the time they commit disciplinary infractions. The effect of the Court of Appeals' first holding will be an unseemly race between the employee to enter treatment and the employer to impose final discipline, which will penalize with Section 504 liability an employer whose delay in implementing appropriate and permissible discipline is caused by its compliance with its obligations under the applicable collective bargaining agreement (or other legal obligation). If the employer loses the "race," the Court of Appeals' holding that the "otherwise qualified" determination is likewise to be made as of the date of actual discharge will require an employer to "forgive" disciplinary infractions committed by unrehabilitated substance abusers who do not seek treatment until after the fact. Thus the Court of Appeals' decision imposes an oppressive double burden upon an employer: it cannot terminate the employment of a "current" alcoholic if the employee claims to be rehabilitated or rehabilitating before the end of the disciplinary process, and it cannot consider him not "otherwise qualified" solely on account of past offenses, no matter how egregious, if the employee can show the offenses were causally related to his substance abuse.

In its imposition of both a "present-time inquiry" and a "forward-looking inquiry" (A21), the Court of Appeals requires the employer to be prescient. First, the employer must predict at the time the employee commits a disciplinary infraction whether his substance abuse will still be current at the completion of the disciplinary process. Second, if the employee claims at any point in the disciplinary process to be rehabilitated or rehabilitating, the employer must predict whether the employee's rehabilitation will be effective and whether, if it may not be, he will be "otherwise qualified" to perform his job duties in the future. If the finder of fact happens to disagree with the employer's predictions, the employer faces certain Section 504 liability to an employee whose job performance had been unacceptable. Most employers cannot terminate a current substance abuser's employment instantaneously upon his commission of

a dismissible offense because of collective bargaining agreements or other legal obligations. Thus the employer's only safe course is inaction – to refrain from imposing discipline and "wait and see" for an indefinite period of time. Meanwhile, the employer's operational and safety concerns are compromised in a way Congress clearly did not intend.

A. The Court of Appeals' Holding Ignores the Plain Meaning of the Word "Current" in Section 706(8).

Section 706(8) excludes "current" alcoholic employees from protection under both Section 503, 29 U.S.C. §793, which applies to federal contractors, and Section 504. (D1)[5] Although Teahan conceded that the absences for which Metro-North terminated his employment were excessive (A3), the Court of Appeals held that, where there is a delay between an employee's disciplinary infractions and the employer's final discipline, the determination whether an employee's "current use of alcohol prevents [him] from performing the duties of the job in question" is "a present-time inquiry" to be determined as of the date of the employer's final disciplinary action. (A21)

The Second Circuit is the first court directly to construe this statutory language and hence there is no direct conflict among courts. Other courts, however, have assumed the plain meaning of this and similar statutes – that they do not protect employees whose alcoholism causes performance problems for which dismissal is justified.

In *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (D.C. Cir. 1986), plaintiff was a federal employee with 23 years of service who had struggled with alcoholism since the age of 10. At the time of the termination of his employment he was unrehabilitated, *id.* at 128-29, although that event prompted him finally to obtain treatment, so that by the time of trial he had "been sober for more than a year following seven months of intensive in-patient treatment. . . ." *Id.* at 129.

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[5] References to "D__" are to the text of the statutes we discuss, reproduced in Appendix D.

The district court noted that "[f]ederal alcoholic employees who are using alcohol excessively are protected under only one section of the Act, Section 501[6] [29 U.S.C. §791, (D2)], whereas other federally employed individuals who are handicapped by other conditions or are rehabilitated alcoholics also enjoy the protection of Section 504 of the Act." *Id.* at 129. The court held that, because "[t]here is no question here that the plaintiff was currently using alcohol and was in need of rehabilitation at the time of the incidents giving rise to this suit," he "is not protected by Section 504." *Id.* at 129 n.3 (quoting H. R. Rep. 1149, 95th Cong., 2d Sess. 22-23, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7333-34). *See also Lemere v. Burnley*, 683 F. Supp. 275, 276 n.1 (D.D.C. 1988).

Other courts have also used "current" to mean "contemporaneously" with the disciplinary infractions. *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir.), *cert. denied*, 111 S.Ct. 555 (1990), is identical on its facts to the instant case in that the alcoholic former FBI agent had become rehabilitated by the time his employment was terminated. *Id.* at 872-73. Even though the FBI was notified some months before it terminated Butler's employment that his "prognosis will be excellent for recovery and prolonged abstinence" and even though he had abstained from drinking for some nine months before his termination, *id.* at 872-73, the court found that "the recurring incidents that precipitated . . . [his] termination reveal him to have been *a*

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[6] By its very terms Section 501 requires the federal government to exert substantial affirmative efforts to assist the handicapped, and the regulations promulgated by the Equal Employment Opportunity Commission require the federal government to be a "model employer of the handicapped." 29 C.F.R. §1613.703 (1978). Thus case law developed under that statute generally requires federal employers affirmatively to assist an unrehabilitated employee in overcoming his illness and prohibits federal employers from taking disciplinary action for unsatisfactory performance related to that illness until they have exhausted a lengthy "reasonable accommodation" obligation. *See, e.g., Rodgers v. Lehman*, 869 F.2d 253, 258-59 (4th Cir. 1989); *McElrath v. Kemp*, 741 F. Supp. 245 (D.D.C. 1990); *Callicote v. Cheney*, 744 F. Supp. 3 (D.D.C. 1990); *Walker v. Weinberger*, 600 F. Supp. 757, 761-62 (D.D.C. 1985); *Whitlock*, 598 F. Supp. at 131. Non-federal employers are not subject to these requirements.

*current dysfunctional alcoholic at the time of his firing.*" *Id.* at 874 (emphasis added). The court held that the Hughes Act, 42 U.S.C. §290dd-1, "embraces both prior alcohol abusers, and current abusers who are functional in their jobs, but not current dysfunctional abusers." 900 F.2d at 874.[7] Thus, in the context of disciplinary offenses caused by alcoholism, the court used the word "current" to mean current at the time the employee committed the offenses which resulted in the termination of his employment, not current at the time of the final discipline. *See also Railway Labor Executives' Ass'n v. Burley*, 839 F.2d 575, 591 (9th Cir. 1988), *rev'd on other grounds sub nom., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (where plaintiff challenged post-incident drug and alcohol testing regulations promulgated by the Federal Railroad Administration, the court held that it had not stated a claim under Section 504 because "[t]he regulations do not mandate any discriminatory treatment . . . of those who 'flunk' the drug or alcohol tests" and because "[i]t appears from the plain language of the statute *that only alcoholics or drug abusers whose problems are under control are protected from discriminatory treatment*" (emphasis added)); *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 600-01 (S.D.N.Y. 1988) (where employees challenged disciplinary action based upon positive drug test results, the court held that they had not stated a claim under Section 504 because they had not shown that their positive test results were attributable to their participation in a rehabilitation program).

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[7] In reaching its holding, the Court in *Butler* construed the following language in the Hughes Act (the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970):

> (b) (1) No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior alcohol abuse or prior alcoholism.
>
> • • •
>
> (c)This section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment.

42 U.S.C. §290dd-1(b)(1), (c) (1986).

This Court should resolve the question whether Congress intended Section 504 (and Section 503) employers, upon penalty of liability, to forego disciplining employees who have been dysfunctional in their jobs but who have become "rehabilitated or rehabilitating," *Burka*, 680 F. Supp. at 600, by the time the employer can act.

B. The Court of Appeals' Holding Ignores the Commonsense Meaning of Section 504.

In *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), this Court held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Teahan has conceded that his absences from work were excessive (A3), and the board upheld his dismissal under the collective bargaining agreement (E2). Thus Teahan indisputably failed to satisfy Metro-North's legitimate criteria for performance.

Yet the Court of Appeals held that the question whether an employee who has committed dismissible offenses is "otherwise qualified" is to be determined as of the date of the final dismissal, rather than as of the time of his commission of the offenses or the initiation of disciplinary procedures. (A20) The "forward-looking inquiry" the court has imposed (A21) means that Section 504 requires an employer to "accommodate" an alcoholic by "forgiving" performance problems caused by his alcoholism once he enters rehabilitative treatment, even if those problems constituted an indisputably proper basis for a contemporaneous disciplinary decision. This is not what Congress intended in the "otherwise qualified" prong of Section 504 as applied to current employees who are substance abusers. *See* 124 Cong. Rec. 30323 (Sept. 20, 1978).

We know of no case interpreting Section 504 to require a non-federal employer to "accommodate" a rehabilitating alcoholic by "forgiving" the transgressions he committed while his problem was active and which gave rise to disciplinary action. Section 501, unlike Section 504, requires "affirmative action" and does not use the term "otherwise qualified" to modify "individuals

with handicaps" (D2). The federal employer is on notice from the language of Section 501 and from the fact that "current" alcoholics are not excluded from its protections that the employer must be on the "lookout" for signs that an employee's performance problems are attributable to current alcoholism. Yet notwithstanding the clearly greater burden Congress imposed upon federal employers in Section 501, the Court of Appeals has held Metro-North to an even higher standard of accommodation than that applicable to federal employers. *See Mantolete v. Bolger*, 767 F.2d 1416, 1425 (9th Cir. 1985) (emphasizing that burdens imposed upon federal employers under Section 501 are greater than those imposed upon Section 504 employers) (Rafeedie, J., concurring).

The court's imposition of a "forward-looking inquiry" is contrary to the statutory scheme and to the understanding other courts have expressed that the relevant time for determining whether an employee is "otherwise qualified" under Section 504 is the time of the unsatisfactory performance. *See, e.g., Taub v. Frank*, __F. 2d__, 1992 WL 26047 (1st Cir.) (Feb. 18, 1992) (in affirming grant of summary judgment to employer where drug-addicted employee had committed disqualifying drug-related criminal offenses, court held the employee was not "otherwise qualified" and the employer was not required to "accommodate" by abrogating its established standards); *Anderson v. University of Wisconsin*, 841 F.2d 737, 740-41 (7th Cir. 1988) (in affirming grant of summary judgment to university which had refused readmission under its retentions program to alcoholic law student, court held the student was not "otherwise qualified"); *Richardson v. United States Postal Service*, 613 F. Supp. 1213, 1215-16 (D.D.C. 1985) (in granting summary judgment to employer where employee contended his disqualifying off-duty criminal conduct was caused by his alcoholism, court held plaintiff was not "otherwise qualified" and employer had no duty under Section 504 to accommodate retroactively). *Cf. Butler*, 900 F. 2d at 875-76 (in Section 501 case, court held rehabilitating alcoholic had "shown himself incapable of safely performing his duties" (citing 29 C.F.R. §1613.702(f)); *Lemere*, 683 F. Supp. at 280 (in granting summary judgment to employer in Section 501 case, court held alcoholic employee to have lost

status of "qualified handicapped employee" by virtue of her two-year pattern of unscheduled absences (quoting 29 C.F.R. §1613.704(a)).

And regardless of the particular disability which causes it, courts have viewed excessive, unauthorized absenteeism, measured contemporaneously with the absences, sufficient to render an employee not "otherwise qualified" and therefore not protected by Section 504 as a matter of law. *See, e.g., Matzo v. Postmaster General*, 685 F. Supp. 260, 263 (D.D.C. 1987), *aff'd without opinion*, 861 F.2d 1290 (D.C. Cir. 1988) (court found manic depressive employee who had been unable for approximately 15 months "to report for work and remain on duty" not "otherwise qualified," notwithstanding the remission of her illness); *see also, e.g., Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd without opinion*, 831 F.2d 298 (6th Cir. 1987) (unscheduled absences rendered employee not "qualified," citing 29 C.F.R. §1613.704(a)); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1415 (N.D. Ga. 1983) (Section 501 "does not protect absenteeism or employees who take excessive leave and are unable to perform the prerequisites of their jobs"); *cf., e.g., Camporeale v. Airborne Freight Corp.*, 732 F. Supp. 358, 367-68 (E.D.N.Y.), *aff'd without opinion*, 923 F.2d 842 (2d Cir. 1990) (dismissal from employment for excessive absenteeism caused by depression not unlawful discrimination under the New York Human Rights Law, N.Y. Exec.L. §§ 292(21), 296(1)(a) (McKinney 1982 & Supp. 1989)); *Giaquinto v. New York Telephone Co.*, 135 A.D.2d 928, 522 N.Y.S.2d 329 (3d Dept. 1987) (same with respect to excessive absences caused by illnesses requiring hospitalization).

This Court should resolve the question whether Congress intended Section 504 employers, upon penalty of liability, to forego disciplining an alcoholic employee whose transgressions render him unqualified to perform his job if he enters rehabilitative treatment prior to the effective date of the discipline.

II. The Court of Appeals' Decision Affects Other Statutes.

Immediate review of the issues raised by the Court of Appeals' decision is particularly warranted in light of other statutes, both federal and state, which courts construe in accordance with

precedent under Section 504, and in light of the imminent effective date of Title I of the Americans with Disabilities Act, Pub. L. 101-336 (July 26, 1990) (to be codified at 42 U.S.C. §12101, *et seq.*) ("ADA").

The Court of Appeals' opinion is the first appellate decision to address expressly the meaning of "current" under the Rehabilitation Act and the date as of which an employer must determine whether a substance absuer is "otherwise qualified" to perform his job. Although the opinion is inconsistent with the understanding evinced by other courts' decisions, the Court of Appeals' express rulings on these issues will have a profound and rippling effect on the application of the Rehabilitation Act and other statutes. For example, other federal statutes use the word "current" to define the substance abusers excluded from the protection they provide for discrimination against the handicapped. *See, e.g., United States v. Southern Management Corp.*, __F.2d__, 1992 WL 15568 (4th Cir.) (Feb. 3, 1992) (construing Fair Housing Act provision excluding "current, illegal use of or addiction to a controlled substance" from the term "handicap," 42 U.S.C. §3602 (h) (1990), consistently with Section 706(8)). Courts also rely upon Section 504 precedent in construing state non-discrimination statutes. *See, e.g., Magel v. Federal Reserve Bank*, 776 F. Supp. 200, 203 (E.D. Pa. 1991) (relying upon "analogous" Section 504 precedent to construe Pennsylvania Human Relations Act, 43 P.S. §955 (a)); *Burka*, 680 F. Supp. at 601 (relying upon Section 504 precedent in dismissing, along with claims under Section 504, claims asserted under the "corollary provision" of the New York Human Rights Law, N.Y.Exec.L. §296 (1)).

Moreover, the district courts' interpretation of the ADA will no doubt be influenced by the Court of Appeals' decision. The ADA applies to private sector employers (ADA, §101(5)) and excludes from the definition of "qualified individual with a disability" an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use" (ADA, §104(a)). In defining "current," the Court of Appeals has already suggested that Congress did not mean what it clearly said in both the 1990 amendment to Section

706(8) and in Section 104(a) of the ADA — that an employer can refuse to hire or can dismiss an employee solely on the basis of his status as a user of illegal drugs. (*See* A19 n.2.)

The ADA codifies a principle we had thought to be true of Section 504 (*see* 124 Cong. Rec. 30323 (Sept. 20, 1978)) — that an employer

> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. . . .

(ADA, §104(c)(4)). But the Court of Appeals' holdings that the actual date of termination is the operative date for assessing both substance abuse and employee qualification has negated this principle, not only for Section 504 employers but also for ADA employers as well.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court to issue a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 120—August Term 1991

(Submitted August 29, 1991

Decided December 27, 1991)

Docket Nos. 91-7431, 91-7501

JOHN TEAHAN,

*Plaintiff-Appellant-Cross-Appellee,*

—v.—

METRO-NORTH COMMUTER RAILROAD COMPANY,

*Defendant-Appellee-Cross-Appellant.*

Before:

OAKES, *Chief Judge,*
FEINBERG and CARDAMONE, *Circuit Judges.*

John Teahan appeals from the April 9, 1991 judgment of the United States District Court for the Southern District of New York (Lowe, J.) granting Metro-North Commuter Railroad Company's motion for summary judgment

and dismissing appellant's complaint under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Reversed and remanded.

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C. SUE BARNETT, Labor Counsel, Office of the General Counsel, Metro-North Commuter Railroad, New York, New York, *filed a brief for Defendant-Appellee.*

PATRICK M. WALL, New York, New York (Graham, Campaign & McCarthy, P.C., New York, New York, of counsel), *filed a brief for Plaintiff-Appellant.*

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CARDAMONE, *Circuit Judge*:

Appellant is an alcoholic who claims that his disease constitutes a handicap under § 504 of The Rehabilitation Act of 1973. This section of the Labor Law aims to balance the statutory guarantee of equal opportunity for the handicapped person so that he or she may become a contributing member of the workforce against the rightful concern of an employer that is the recipient of federal funds to preserve the effectiveness of its programs. For an employer to assume that simply because of a handicap an individual is unable to function in a given employment context stereotypes that person, seeing him, as it were, through a glass, darkly. To view a handicapped person in such a simplistic way effects the discrimination forbidden by § 504. At the same time nothing in the statute prevents an employer from making a decision based on the job-

related attributes of a person's handicap. It is the close interplay of these two notions, that is, between a handicap and its attributes, that we must analyze and resolve on this appeal.

## BACKGROUND

John Teahan was employed by Metro-North Commuter Railroad (Metro-North) as a telephone and telegraph maintainer from 1983 to 1988. Concededly, through these five years his alcohol and drug abuse led to his being unexcusedly absent from work on numerous occasions. Teahan agrees that his absences—19 in 1984, 47 in 1985, 58 in 1986, and 53 in 1987—were excessive. On March 7, 1986 appellant voluntarily enrolled in a 30-day rehabilitation program at Parkview Hospital in Yorktown Heights, New York. After his discharge from this program, he relapsed into further drug and alcohol abuse and continued to incur unauthorized absences from work. Metro-North progressively disciplined Teahan for his absences, including warning letters, three and five day record suspensions, and 14 and 30 day actual suspensions. In the late fall of 1987 he informed his employer of his substance abuse problem.

The incidents of absenteeism giving rise to this litigation occurred in December, 1987. Teahan was absent without permission on December 10, 11, 17, and 18. On December 28, 1987 Metro-North charged Teahan by letter that his failure on those dates to notify his work location of his inability to come to work, in light of his previous record, constituted excessive absenteeism. On December 28—before receiving this charge letter—Teahan had voluntarily entered a substance abuse rehabilitation program at Conifer Park Rehabilitation Center

in Scotia, New York (Conifer Park). This time appellant successfully completed the program and returned to work on January 28, 1988. From that date until his dismissal on April 11, 1988 he was not absent from work and appears to have otherwise fully performed the requirements of his job.

Meanwhile, following its charge letter, from December 28, 1987 to April 11, 1988 Metro-North pursued Teahan's dismissal under disciplinary procedures set forth in its collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW). *See* 45 U.S.C. § 151 *et seq.* It was only in accordance with this agreement that Metro-North had permitted Teahan to return to work on January 28.

IBEW appealed the April dismissal unsuccessfully through the two levels of review established under the collective bargaining agreement. The Special Board of Adjustment that heard the final appeal upheld the employer's actions, concluding that Teahan's dismissal due to excessive absenteeism was justified and that his "previous record [was] not supportive of any request for leniency and certainly cannot mitigate the sanction imposed." No reference was made in the decision to Teahan's work record since his successful completion of the Conifer Park program.

## THE PROCEEDINGS BELOW

Appellant filed suit against his employer Metro-North in the United States District Court for the Southern District of New York (Lowe, J.), alleging that his April 11, 1988 dismissal violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Act). The complaint asserted that

as a drug and alcohol abuser he was an "otherwise qualified individual with handicaps" covered by the Act, and that he was dismissed by Metro-North "solely by reason of" his handicap. Metro-North moved for summary judgment contending that appellant was unable to make out a *prima facie* case under § 504.

The district court granted Metro-North's motion on April 5, 1991. It ruled that § 504 required Teahan to prove that he (1) is a "handicapped person" under the Act, (2) who is "otherwise qualified," and (3) was terminated "solely by reason of" his handicap. Metro-North concedes Teahan's position is one that is part of a program receiving federal financial assistance, the fourth element of a § 504 claim. The district judge found genuine issues of material fact existed as to elements (1) and (2), but granted summary judgment in favor of Metro-North on element (3). With respect to this element, Judge Lowe believed Metro-North had not relied on Teahan's handicap and had shown a nondiscriminatory reason for firing him (excessive absenteeism), and that this shifted the burden of proof to Teahan to show that Metro-North's asserted reason was pretextual, which he failed to carry.

On appeal Teahan argues that because the ground upon which he was terminated was his excessive absenteeism, and since his absenteeism was "caused by" his substance abuse problem, the district court improperly shifted the burden to him to present evidence of pretext. We agree and for the reasons discussed below therefore reverse.

## DISCUSSION

### 1. Burden of Proof under § 504.

We start with the statute. Section 504 in relevant part provides:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981), we laid out two alternatives to use in deciding discrimination suits under § 504, depending on whether the employer disclaims any reliance on the employee's handicap or acknowledges reliance on the handicap in its employment decision. Because the statute does not bar an employer from considering an employee's handicap, a § 504 action often is not susceptible to the burden-shifting order of proof regularly employed in discrimination suits. *See also Alexander v. Choate*, 469 U.S. 287, 298 (1985) (handicapped persons are not ordinarily situated similarly to the nonhandicapped). Where an employer's actions have no relation to an employee's handicap, that is, where the employer "disclaims reliance" on the handicap, the analysis developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), for suits under Title VII of the Civil Rights Act of 1964 is appropriate. In other words, at the final step the employee has the burden to prove that the employer's given reason for the action taken was a pretext for discrimination and the employee must show that the employer's action had a

disparate impact. *See also Prewitt v. United States Postal Service*, 662 F.2d 292, 305 n.19 (5th Cir. 1981) (approving of disparate impact analysis in § 504 context).

Although Teahan concedes he offered no evidence of disparate impact or treatment, he nonetheless contends that summary judgment was improper because *Doe's* other § 504 approach should have been applied. His suit, he continues, is the more typical one where an employer acknowledges that in taking adverse action against an employee it relied on plaintiff's handicap, which may be a permissible and appropriate factor to consider with respect to an employee's qualifications. In such cases, after complainant proves a *prima facie* case, the employer is required to rebut the inference that the handicap was improperly considered by demonstrating that it was relevant to the job qualifications. *See Doe*, 666 F.2d at 776; *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981) (placing burden on defendant to show handicap-related inability of plaintiff to meet job requirements). The plaintiff, of course, bears the ultimate burden of proving that despite his handicap he is qualified. *See Doe*, 666 F.2d at 776-77.

The initial question then is whether Metro-North fired Teahan "solely by reason of" his handicap, thereby relying on his handicap. The district court concluded that because Metro-North terminated him on account of absenteeism, it was not relying on his alcoholism. The significant difference, as set forth above, is that where the employer relies on an employee's handicap for its employment decision, the employer has the burden of proving the handicap is relevant to the job requirements.

2. The "Reason" for Teahan's Dismissal

Teahan's contention that he was fired because he was an alcoholic presents a question of fact as to whether his excessive absenteeism was caused *solely* by his substance abuse. Only if the only reason for his absenteeism was appellant's alcoholism do we reach the second portion of his argument, that is, his claim that he was fired "solely by reason of" his handicap. Although the causal connection between absenteeism and alcoholism is ordinarily a question of fact, not properly capable of resolution under a Rule 56 motion, we must examine the facts in the light most favorable to the party against whom summary judgment was granted, and therefore assume the existence of the causal relationship here. *See, e.g., Bailey v. Hartford Fire Ins. Co.*, 565 F.2d 826, 830 (2d Cir. 1977). Hence, we must determine whether an employee who has excessive unexcused absences from work as the result of alcoholism is terminated "solely by reason of" his handicap when his employer relies on the absenteeism to terminate his employment. Analysis of the legislative purpose underlying the statute and of the case law interpreting § 504 suggests the answer is "yes."

We turn first to examine § 504 which simply provides that "an otherwise qualified handicapped individual" not be discharged from federally funded employment "solely by reason of his handicap." An employer obviously may not assume that because a person has a handicap, he or she is unable to function in a given work context. Although the Act forbids discrimination based on stereotypes, an employer is entitled to make employment decisions based on the "actual attributes of the handicap." *See Anderson v. University of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1988). *See also Southeastern Community College*

*v. Davis*, 442 U.S. 397, 405 (1979) (Section 504 "indicat[es] only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context"); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987) (basic purpose of § 504 "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others"). Metro-North insists that Teahan was terminated because of his excessive absenteeism, which it concluded was an actual attribute of his handicap.

We recognize that Metro-North may use its established criteria for employee performance without violating § 504. But it does not inevitably follow that termination for *conduct* resulting from a handicap is not termination "solely by reason of" that handicap. By equating the employer's motivation for firing with the employee's conduct, the relevant § 504 inquiry collapses; that is to say, absenteeism resulting from alcoholism is a factor that bears on whether an employee is "otherwise qualified" for the position, but absenteeism is irrelevant to whether he was terminated in the first place "solely by reason of" his handicap.

The "solely by reason of" inquiry is designed to weed out § 504 claims where an employer can point to conduct or circumstances that are causally unrelated to the plaintiff's handicap. *See, e.g., Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990) (employer's asserted reason budget constraints and restructuring); *Ross v. Beaumont Hosp.*, 687 F. Supp. 115, 118 (E.D. Mich. 1988) (plaintiff's abusive behavior was significant factor in employer's decision); *Norcross v. Snead*, 573 F. Supp. 533, 544 (W.D. Ark. 1983) (reasons for hiring individual other than plaintiff were greater experience and better prior work record);

*Assa'ad-Faltas v. Com. of Va.*, 738 F. Supp. 982, 987 (E.D. Va. 1989) (failure to allege her handicap served as reason for employer's actions precluded plaintiff from stating § 504 claim).

That an employee be terminated "solely by reason of" his handicap is a necessary element of a § 504 claim. But an employee may be terminated "solely by reason of" his handicap even though the employer disclaims any reliance on it. That is the reason why in such a case the employer has the burden of showing the handicap is relevant to the employee's work in order to rebut the inference that the handicap was improperly considered. A plaintiff is entitled to challenge as pretextual an assertion that the employer is not relying on the employee's handicap. But when the employer does not disclaim reliance on the handicap, the "solely by reason of" element is by definition satisfied. The question then becomes whether the employee is qualified despite his or her handicap to perform the essential functions of the job. *See Arline*, 480 U.S. at 287 n.17. The district court erred when it concluded that appellant was not fired "solely by reason of" his handicap. As a result of that ruling, Teahan was not given an opportunity to show that he was a handicapped individual protected by § 504 or that he was "otherwise qualified" for the position despite his alcoholism.

In assessing the reasons prompting the firing, the district court's discussion distinguishes between a handicap and its consequences. But the handicap and its consequences are distinguished for purposes of § 504 only in assessing whether or not the firing was discriminatory. If the consequences of the handicap are such that the employee is not qualified for the position, then a firing because of that handicap is not discriminatory, even though the firing *is* "solely by reason of" the handicap.

*See* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 485 (whether defendant states legitimate, non-discriminatory reason for exclusion of plaintiff is one of causation, not justification).

An example may help to illustrate this point. An employee has one leg shorter than the other, causing him to limp, which we assume is a "handicap" under § 504. The limp causes the worker to make a loud "thump" when he takes a step. He is fired, his employer says, because of the thumping. Under the district court's analysis the employee may not maintain a suit under § 504 because the handicap is the limp, not the thump; hence the worker was not fired "solely by reason of" his handicap, but rather because of an attribute caused by the handicap.

This analysis misinterprets *Doe's* holding that when an employer "disclaims any reliance" on a plaintiff's handicap, the burden is automatically shifted to the plaintiff to disprove the employer's proffer of a legitimate (i.e., nondiscriminatory) reason for the termination. 666 F.2d at 776. "Disclaims any reliance" refers to *any reliance*; an employer "relies" on a handicap when it justifies termination based on conduct caused by the handicap. An employer does *not* "rely" on a handicap when it can point to behavior that is not causally related to that handicap.

Returning again to the limping employee, the district court's analysis would mean that when the employer disclaims reliance—in the absence of establishing the employer's asserted reason as pretextual—the worker is not given an opportunity to show that he is "otherwise qualified." Yet, the proper analysis is that the causal

connection between the limp (handicap) and the thump (symptomatic manifestation of the handicap) is such that the employer did "rely" on the handicap.

The difficulty with the district court's reasoning therefore is that it would allow an employer to "rely" on any conduct or circumstance that is a manifestation or symptomatic of a handicap, and, in so doing, avoid the burden of proving that the handicap is relevant to the job qualifications. The conduct associated with or which is a manifestation of a handicap is quite relevant, *as distinct from the handicap itself*, in assessing whether a worker is "otherwise qualified," and therefore, whether the termination was justified. For example, in this very case it may be that, despite two and one-half months of good work, there is sufficient likelihood of relapse, which together with job-related conduct, could render Teahan not "otherwise qualified." Any such conduct is, of course, *not* pertinent when assessing the reason for the termination. Numerous courts have at least implicitly agreed with this view insofar as § 504 suits have been entertained when an employee's termination was prompted by substance abuse-related or -induced conduct. *See, e.g., Rodgers v. Lehman*, 869 F.2d 253, 254 (4th Cir. 1989); *Callicotte v. Cheney*, 744 F. Supp. 3, 4 (D. D.C. 1990); *McElrath v. Kemp*, 741 F. Supp. 245, 246 (D. D.C. 1989); *Nisperos v. Buck*, 720 F. Supp. 1424, 1426 (N.D. Cal. 1989); *see also Walker v. Weinberger*, 600 F. Supp. 757, 761 (D. D.C. 1985).

We hold therefore that termination by an employer subject to the Act which is justified as being due to absenteeism shown to be caused by substance abuse is termination "solely by reason of" that substance abuse for purposes of § 504. In sum, whether or not absenteeism is "caused" by a handicap is a question of fact. We note that

the relevant inquiry is into the causal connection of those absences. We need not now decide the precise contours of causality necessary to satisfy this element of a § 504 claim. If only a small percentage of Teahan's absences can be shown to have been "caused" by his alcoholism, and a sufficiently great number of absences are not so caused, such would provide grounds for Metro-North to terminate appellant as not prompted solely by reason of his handicap.

3. "Handicapped Individual"

Because the district court concluded that Teahan was not terminated "solely by reason of" his handicap and therefore failed to establish the third necessary element of his § 504 claim, it did not address whether Teahan was an "individual with handicaps" covered by the Act. As a preliminary matter, it is clear that substance abuse is a "handicap" for purposes of the Rehabilitation Act. *See, e.g., Rodgers*, 869 F.2d at 258; *Callicotte*, 744 F. Supp. at 4; *Walker*, 600 F. Supp. at 761; *Wallace v. Veterans Admin.*, 683 F. Supp. 758 (D. Kan. 1988); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 (D. D.C. 1984); 43 Op. Atty. Gen. April 12, 1977.

Metro-North asserts that despite his handicap, Teahan is not within the protection of § 504 due to the second sentence of § 706(8)(B). At the time of Teahan's dismissal this section provided that for purposes of § 504, as that section relates to employment, "handicapped individual"

> does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs

> prevents such individual from performing the duties of the job in question . . .[1]

Of course, if Teahan is not a "handicapped individual" covered by § 504, no claim under that section may lie against Metro-North. *E.g. Arline*, 480 U.S. at 279; *Doe*, 666 F.2d at 774. The crux of the parties' competing viewpoints is whether or not Teahan was a "current" abuser of drugs and alcohol at the "relevant time."

Metro-North asserts that the "relevant time" to assess Teahan's status as a "current" abuser of alcohol and drugs is when the *decision* to terminate is made. That date here would be on December 28, 1987 when Teahan was notified that disciplinary charges would be brought—before he completed the Conifer Park program. On that date appellant was a current abuser of alcohol and drugs who, according to his employer, was not within the protection of § 504. *See Heron v. McGuire*, 803 F.2d 67, 69 (2d Cir. 1986) (plaintiff whose current drug habit renders him unfit to perform job unprotected by § 504). Appellant insists, on the other hand, that the "relevant time" to assess his status as a substance abuser is on April 11, 1988 when he was *actually fired*—after successfully completing the Conifer Park program.

It is clear that insofar as the Rehabilitation Act evinces a general recognition of substance abuse as a disease, discrimination on the basis of such a handicap is antithetical to one of the goals of the Act—to ensure that handicapped

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1 In 1990, § 706(8)(B) was amended, Pub. L. 101-336 § 512(c), and § 706(8)(c)(i) now provides that "the term 'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs, when [an employer] acts on the basis of such use," and § 706(8)(c)(v) now provides that "the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question . . ."

persons are not victimized in the employment context by archaic or stereotypical assumptions concerning their handicap. *See Arline*, 480 U.S. at 284. But nothing in the language, history or precedents interpreting § 504 suggest that this provision is designed to insulate handicapped individuals from the actual impact of their disabilities. *See Alexander*, 469 U.S. at 300 ("*Davis* struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs"). Consequently, we must be wary lest § 504 be applied as a haven to protect substance abusers who have not in the past sought—nor do they seek in the present—help. *See Burka v. New York City Transit Authority*, 680 F. Supp. 590, 597 (S.D.N.Y. 1988).

It is against this background that the meaning of the word "current" in § 706(8)(B) must be determined. It would defeat the goal of § 504 to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome. *See Walker*, 600 F. Supp. at 762 (use of pre-treatment alcohol-related problems for disciplinary purposes is inconsistent with legislative perception of alcoholism as a disease). The statute plainly is designed to protect rehabilitated or rehabilitating substance abusers from retroactive punishment by employers. *See Burka*, 680 F. Supp. at 599; *Nisperos*, 720 F. Supp. at 1427; *see also Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985) (a recovered alcoholic is an individual with handicaps within the meaning of the Rehabilitation Act). Yet, we recognize that the present facts pose a scenario different from that envisioned in the statute. Here, the employee's past substance abuse is relied on by the employer not to exact retroactive punishment, but to deal with a built-in delay between its

decision to terminate Teahan and actual date of his release, attributable to its compliance with procedures mandated under its collective bargaining agreement.

Nevertheless, although we have found no case law addressing this point, we think the relevant time for assessment of Teahan's "current" status is the time of his actual firing. This view best comports with the legislative purpose of ensuring that rehabilitated or rehabilitating individuals are not discriminated against on the basis of past substance abuse. The provision excluding current substance abusers from the protection of § 504 ensures that the integration of the handicapped into the workforce is not an overly burdensome process, financially or otherwise, for the employer. *See Alexander*, 469 U.S. at 299-300; *see also Heron*, 803 F.2d at 69. The relevant burden in this context is the extent to which an employer subject to the Act is required to alter its working environment and the impact such change would have on maintaining its own standards for acceptable job performance. *See, e.g., Davis*, 442 U.S. at 413 (section 504 "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person").

The burden imposed upon Metro-North may not be deemed to outweigh the Act's purpose affording substance abusers an opportunity to overcome their handicap and become as fully integrated into the workforce as possible. In light of the fact that the procedures utilized by the IBEW were within the scope of those granted employees under the collective bargaining agreement, Metro-North's argument that it could not, by reason of its legal obligations, win the race to final discipline before the employee enters the sanctuary of a hospital is way wide of the mark. The reason for that delay in the case at hand is irrelevant;

the pivotal inquiry is whether allowing the employee to utilize the delay to seek treatment unreasonably prejudices the employer.

The appellate procedures available to a disciplined employee under the labor agreement were known by Metro-North and were part and parcel of Teahan's employment. *See J.I.Case Co. v. National Labor Relations Board*, 321 U.S. 332, 335 (1944) (a collective bargaining agreement "results in an accord as to the terms which . . . govern [employment]"). His employment encompassed those review procedures he was entitled to invoke when the employer sought to initiate disciplinary action against him. As a consequence, appellant's employment was not terminated until these procedures had been complied with. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) ("the collective [bargaining] agreement covers the whole employment relationship").

We are unpersuaded that assessing Teahan's status as a current substance abuser as of the date of actual discharge amounts to such an interference with or is such an unfair surprise to Metro-North as to overcome the legislative goal of encouraging substance abusers to seek treatment. Further, because Teahan enrolled in the Conifer Park program before receiving official notice of disciplinary charges—and in light of his apparent recovery—we are loathe to classify him as a continuing substance abuser seeking a safe haven under § 504.

The language of the statute itself supports this conclusion. It was triggered upon Teahan's being "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination." It is more logical to rule that Metro-North's action that subjected it to § 504

was the date of Teahan's actual discharge, not the time when that decision was made.

It may well be, as Metro-North states, that the rule it "propose[s] would apply only where competing legal obligations prohibit the employer from acting immediately." We cannot share this optimism regarding any such rule that may be enunciated. Permitting an employer to raise competing obligations, legal or otherwise, as a reason preventing it from finally terminating an employee concurrently with the decision presents difficulties as to when that decision was made. In addition, adopting such an argument creates a potential loophole that exposes rehabilitating substance abusers to the type of retroactive punishment that the Act expressly seeks to prevent.

Moreover, a determination that Teahan's status as a current substance abuser is to be made as of the date of actual termination does not finally resolve the matter, as the legislative history of § 706 relating to current substance abusers states:

> [t]he provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the action in question. Rather the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S. Code Cong. & Admin. News 596.

As noted in footnote 1, § 706(8)(B) was amended so as to result in different sections covering illegal drug users and alcoholics. For purposes of the issues presented, this amendment has no substantive effect on our analysis.

Thus, though the reference is only to illegal drug use, we regard this merely as a result of the statutory separation of illegal drug users and alcoholics, rather than as indicative of any congressional purpose to assess differently a "current" illegal drug user from a "current" alcoholic.

Hence, Teahan's status as a current substance abuser as of April 11, 1988 is a question of fact that requires resolution on remand. Specifically, it must be determined whether on the date of discharge Metro-North held a reasonable belief that Teahan had a current substance abuse problem. "Current" is to be determined in light of the section in which it appears; that is, whether the employee's substance abuse problem is severe and recent enough so that the employer is justified in believing that the employee is unable to perform the essential duties of his job.[2] *See Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); *Burka*, 680 F. Supp. at 600.

Undoubtedly, the resolution of this issue will in large part turn on several factors: the level of responsibility entrusted to the employee; the employer's applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the employee's past performance record. Dis-

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2 The 1990 amendment excludes from coverage a current alcoholic "whose current use of alcohol prevents [him] from performing the duties of the job in question . . ." and a current illegal drug user "when [an employer] acts on the basis of such use." Because both types of substance abusers were previously similarly classified under § 706(8)(B), we find no reason to interpret "act[ing] on the basis of such [illegal drug] use" so as to encompass anything more or less than would justify termination of a "current" alcoholic. *See generally* 43 Op. Atty. Gen. April 12, 1977 (making no distinction between drug abusers and alcoholics for purposes of assessing whether manifestations of the handicap prevent individual from meeting basic requirements of position).

tinct from the analysis undertaken when an employee is terminated "solely by reason of" his handicap is the examination required to determine whether an employee is a "current" substance abuser for purposes of § 706(8)(B). The latter examination involves a determination of how the conduct that is a manifestation or symptomatic of the handicap bears upon the employee's ability to perform the essential duties of his job. Consequently, if an employer reasonably can establish that, on the date an employee is finally terminated, his substance abuse problem is such as to prevent him or her from performing his essential duties, the employee then is a "current substance abuser" excluded from the coverage of § 504.

4. "Otherwise Qualified"

Because the district court concluded that Teahan had failed to establish one element of his § 504 claim, it did not decide whether Teahan was "otherwise qualified." Such is also a question of fact that must be resolved on remand. Only if it is found that Teahan was not a current substance abuser as of April 11 need the district court undertake to determine whether Teahan was, as of April 11, "otherwise qualified," in spite of his handicap, for the job in question. Relevant to resolution of this fact question is, for example, the likelihood of relapse and future absenteeism by Teahan, even if he was not as of that date a "current" substance abuser. *See Doe*, 666 F.2d at 777; *Anderson*, 841 F.2d at 740; *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985); *cf. New York State Ass'n For Retarded Children v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (likelihood must be more than a "remote possibility").

The record does not reveal any job-related conduct other than absenteeism stemmed from Teahan's substance abuse. Yet our discussion should not be read as precluding the possibility that some other job-related manifestation of Teahan's abuse problem might be relevant in deciding whether he is "otherwise qualified." It is not possible to enumerate exhaustively all the factors that go into making such a determination for it requires consideration not only of the conduct that is symptomatic of the handicap, but also the work the employee performs and how the two interact. In other words, whether conduct is job-related depends as much on the job as on the conduct. Inasmuch as Teahan's responsibilities bear on public safety concerns, any conduct demonstrated to be a manifestation of his handicap that is likely to occur in the future and which may implicate those public safety concerns is a matter the district court should consider in determining whether he is "otherwise qualified."

The two questions of whether the substance abuse problem is current enough so as to preclude the employee from being able to perform the essential duties of his job as of the date of actual termination (a present-time inquiry), and whether the employee's handicap is such that he is not qualified to perform the essential duties of the job in question (a forward-looking inquiry), are not mutually exclusive. This is because whether an employee is adequately performing his job as of the date of termination for purposes of deciding whether he is a "current" substance abuser focuses on the individual employee and on how he is *presently* performing; whether the employee is "otherwise qualified" as of the date of termination is forward-looking and enables the employer to consider how the employee will perform as compared to non-handicapped individuals. *See Doe*, 666 F.2d at 776; *cf.*

*Anderson*, 841 F.2d at 741 (relevant question in assessing if one is "otherwise qualified" is not whether student plaintiff can adequately perform, but whether defendant institution would have admitted student with same academic qualifications who was not handicapped).

Finally, we also note that although § 504 does not prevent an employer from requiring a handicapped employee be able to satisfy reasonable job-related requirements, *e.g.*, *Prewitt*, 662 F.2d at 307; *Stutts v. Freeman*, 694 F.2d 666, 669 (11th Cir. 1983), a defendant will bear a heavy burden in attempting to show that freedom from past substance abuse, in and of itself, is an essential job-related requirement. *See Nisperos*, 720 F. Supp. at 1428-1429. The parties raise a question regarding the extent to which an employer's duty to "reasonably accommodate" the handicapped employee bears upon a determination as to whether the employee is "otherwise qualified." *See Davis*, 442 U.S. at 410-11; *Arline*, 480 U.S. at 287 n.17. This question need not be resolved until the district court first makes a finding as to whether Teahan was "otherwise qualified."

## CONCLUSION

Accordingly, the district court's judgment of April 9, 1991 granting summary judgment in favor of Metro-North is reversed and the case is remanded with directions to the district court to reinstate appellant's complaint and to conduct further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December, one thousand nine hundred and ninety-one.

PRESENT: HON. JAMES L. OAKES, Chief Judge
HON. WILFRED FIENBERG
HON. RICHARD J. CARDAMONE

Circuit Judges,

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JOHN TEAHAN,

Plaintiff-Appellant-Cross-Appellee,

-v- 91-7431, 91-7501

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant-Appellee-Cross-Appellant.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court is reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court.

This Document was entered on the Docket on 1-31-92
Issued as Mandate Jan. 24, 1992

ELAINE B. GOLDSMITH, Clerk
By: /s/Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN TEAHAN,

Plaintiff, OPINION AND ORDER

-against-

METRO-NORTH COMMUTER RAILROAD COMPANY, 88 CIV. 5376 (MJL)

Defendant.

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APPEARANCES:

GRAHAM, CAMPAIGN & McCARTHY
36 West 44th Street
New York, New York 10036

BY: PATRICK M. WALL

ROBERT BERGEN, General Counsel
Metro-North Commuter Railroad
347 Madison Avenue
New York, New York 10017

BY: C. SUE BARNETT

MARY JOHNSON LOWE, D.J.

Before this Court is defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff opposes the motion. For the reasons set forth below, defendant's motion is granted.

## BACKGROUND

Plaintiff John Teahan ("Teahan"), formerly employed by defendant Metro-North Commuter Railroad ("Metro-North"), brings this action pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. In particular, Teahan alleges that he was willfully, knowingly, and intentionally terminated by

Metro-North solely on the basis of his physical disability as a reformed alcoholic. Teahan further alleges that Metro-North established a discriminatory policy in direct contradiction of federal law including the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. 290dd-1.

Teahan worked for Metro-North as a telephone and telegraph maintainer from Metro-North's inception in 1983 until his termination on April 11, 1988. Complaint at ¶5; Answer at 1. Metro-North is a subsidiary public benefit corporation duly organized and existing by virtue of the laws of the State of New York, a recipient of federal funds within the meaning of 29 U.S.C. 794, and an employer within the meaning of 29 U.S.C. 701 *et seq.* Complaint at ¶¶ 6-8; Answer at 1.

During 1983 to 1987, Teahan incurred excessive unauthorized absences due to an alcohol and/or drug addiction. Teahan was absent from work a total of 19 days in 1984, 47 days in 1985, and 139 days in 1986. Complaint at ¶¶ 11-14; Defendant's Trial Brief at 1. His supervisors progressively disciplined him for these absences. Complaint at ¶ 16; Defendant's Trial Brief at 1-2.

In early 1986, Teahan sought help for his problems from Metro-North's Employee Assistance Program ("EAP") and underwent voluntary hospitalization at Parkview Hospital from March 7, 1986 through April 8, 1986. Complaint at ¶¶ 17-18; Defendant's Trial Brief at 2. Neither program proved successful, however, and Teahan soon resumed his use of alcohol and drugs, and his established pattern of excessive absenteeism, missing 53 days of work during 1987. Complaint at ¶¶ 13-15; Plaintiff's Trial Brief at 3-4.

On December 10-11, and 17-18, 1987, Teahan incurred additional unauthorized absences. Complaint at ¶ 15. Metro-North filed formal disciplinary charges against him on December 28, 1987. Connor Affidavit at ¶ 2.

After incurring the unauthorized absences on December 17 and 18, Teahan entered and successfully completed a month-long

treatment program at the Conifer Park Rehabilitation Center in Scotia, New York, on December 28, 1987. Complaint at ¶ 20-21. In accordance with the controlling agreement between Metro-North and Teahan's union, the International Brotherhood of Electrical Workers ("IBEW"), Metro-North returned Teahan to work after his hospitalization on January 28, 1988. Complaint at ¶ 22; Connor Affidavit at ¶ 4; Defendant's Trial Brief at 3. After returning to work, Teahan was not absent from his assigned duties for any reason up to the day of his termination on April 11, 1988. Complaint at ¶ 22; Joint Pre-Trial Order at ¶ 5(l). In addition, he reported weekly to Metro-North's EAP for counseling until his termination. Complaint at ¶23; Joint Pre-Trial Order at ¶ 5(m).

On April 11, 1988, following a disciplinary trial, Metro-North dismissed Teahan, citing his unauthorized December 1987 absences and his history of "excessive absenteeism" as reasons for his discharge. Complaint at ¶ 28; Connor Affidavit at ¶¶ 2, 4-6.

The IBEW appealed his dismissal to Special Board of Adjustment No. 934, established by the IBEW and Metro-North pursuant to the Railway Labor Act, 45 U.S.C. 151 *et seq*. The chairman and neutral member, Louis E. Seltzer, heard and rejected the IBEW's appeal for leniency on Teahan's behalf and denied the grievance. Connor Affidavit at ¶ 6.

On July 29, 1988, Teahan filed this action against Metro-North alleging wrongful termination due to his physical disability and discriminatory policies and practices in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[1] Trial briefs

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[1] Teahan has apparently abandoned his claim under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. 290dd-1. This claim only appears in the complaint and joint pre-trial order, but not in the Plaintiff's Memorandum of Law, or Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgement. Further, Section 201 of the 1970 Rehabilitation Act, 42 U.S.C. 290dd-1, provides in pertinent part:

> "No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely

*(Footnote continued)*

by both parties and a joint pre-trial order were filed with this Court, and the case was placed on the "ready trial" calendar.

Before trial, the position of Labor Counsel at Metro-North changed hands. After reviewing the case for trial, the new Labor Counsel requested permission to move for summary judgment, which this Court granted.

## DISCUSSION

In a motion for summary judgment, the moving party has the burden of showing that the record before the court establishes "that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Metro-North, as the party without the ultimate burden of proof at trial, may rely on the record to show an absence of material fact. *Id.* at 322-23. Once Metro-North has satisfied its burden of proof, Teahan has an affirmative obligation to come forward with evidence upon which a jury could reasonably find in his favor in order to withstand the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The substantive law defines when a genuine issue exists. *Id.* at 248.

Section 504 of the Rehabilitation Act of 1973 provides in pertinent part that "[n]o otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794 (1988).

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on the ground of prior alcohol abuse or prior alcoholism." 42 U.S.C. 290dd-1(b) (1).

Section 201 applies solely to federal agencies and federal civilian employees. *See* H.R. Report No. 91-1663, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5719, 5729. Since Metro-North is not a federal agency, and there is no implied cause of action under Section 201 against private employers or unions, *Florey v. Air Line Pilots Ass'n Int'l.*, 439 F. Supp. 165, 172 (D. Minn. 1977), *aff'd* 575 F.2d 673 (8th Cir. 1978), it is not subject to the provisions of Section 201 or the regulations promulgated thereunder. Therefore, this aspect of Teahan's claim will not be considered.

In order to make out a case based on the violation of § 504, a plaintiff must prove (1) that he is a "handicapped person" under the Act, (2) that he is "otherwise qualified" for the position, (3) that he was terminated from the position solely by reason of his handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance. *Doe v. New York University*, 666 F.2d 761, 774-775 (2d Cir. 1981). Since the parties do not dispute that Metro-North satisfies the last element, only the first three elements will be discussed.

As to the first element, Metro-North argues that Teahan has not shown that he was handicapped within the meaning of § 504 at the relevant time. The relevant portion of the Rehabilitation Act provides that:

> For purposes of sections 793 and 794 of this title as such sections relate to employment, [the term "individuals with handicaps"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. 706(8)(B) (1988). Since Teahan's particular handicap is alcohol and drug addiction, he must show that he was rehabilitated or rehabilitating to be protected under the Act. *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 597-600 (S.D.N.Y. 1988). This protection is extended to encourage those with alcohol and drug problems who have not done so to seek treatment, while not providing "those same abusers with assurances of safe haven in the workplace" if they should choose to ignore help. *Id.* at 600. To determine whether any facts regarding this element are genuinely at issue, the moving party must show that, taking the record as a whole, the evidence could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Under this standard, Metro-North fails

to establish that no genuine issue of fact exists. At the time the decision was made to terminate Teahan's employment, he had successfully completed a program at Conifer Park Rehabilitation Center. After returning to work, he did not miss a day of work for any reason until his termination on April 11, 1988. Based on this evidence, a rational trier of fact could reasonably find that Teahan was rehabilitated, and therefore within the protection of the Act at the time he was discharged.

Metro-North claims, however, that the relevant time to determine whether Teahan's *current* use of alcohol or drugs prevented his performing the duties of his job is *at the time of his absences*, not at the time the decision was made to terminate his employment. Since there is no case law directly on point on this issue, the court is being asked to interpret the meaning of the word "current" as it is used in 29 U.S.C. 706(8)(B). However, because the plaintiff's claim fails on other grounds as discussed below, the Court declines to construe the statutory language at this time.

As to the second element of the claim, Metro-North contends that Teahan has failed to show that he was otherwise qualified for his position as telephone and telegraph maintainer. Under § 504, an "otherwise qualified" person is one who is able to meet all of a program's requirements "in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (citing 45 C.F.R. § 84.3(k) (1985)). Metro-North claims that because Teahan has a record of excessive absences, he cannot be depended upon to report to work, and was therefore not "otherwise qualified" for the position. However, Metro-North again fails to establish that there is no genuine issue of fact. Teahan worked for Metro-North in his capacity as a telephone and telegraph maintainer for ten years. This evidence supports his qualifications for the position and capability of fulfilling the "essential functions" of the job. After returning to work, Teahan did not miss a day of work for any reason until the day of his termination. Since his prior absences were allegedly due to his alcohol and drug addiction, and there

is evidence to support his rehabilitation, a rational trier of fact could find that Teahan was capable of reporting to work at the time of his termination. Viewing the record as a whole, there is sufficient evidence to lead a rational trier of fact to find for Teahan, therefore raising a genuine issue of fact. *Matsushita*, 475 U.S. at 587.

Finally, Metro-North claims that since Teahan was terminated solely due to his record of excessive absences, Teahan has failed to make out a *prima facie* case of discrimination based on his handicap. On this element, Metro-North succeeds. Under § 504, the plaintiff must prove that he was terminated "solely by reason of his or her handicap." 29 U.S.C. § 794 (1988). In deciding whether an employer impermissibly took into consideration an employee's handicap, courts apply the *McDonnell Douglas* three-part test used in suits alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. *Doe*, 666 F.2d at 776; *Norcross v. Sneed*, 755 F.2d 113, 116-17 (8th Cir. 1985).[2] In order to make a *prima facie* case, the plaintiff must do more than merely claim to be in a protected group. *See Zahorik v. Cornell Univ.*, 729 F.2d 85 (2d Cir. 1984) (plaintiff who alleged sex discrimination in denial of tenure failed to raise a disputed issue of fact when tenure was denied in the context of a dispute regarding the candidate's academic qualifications, and the statistical evidence was insufficient). Instead, the plaintiff must show that he or she was rejected under circumstances which give

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[2] In suits such as this, where the employer claims no reliance on the employee's handicap in the decision to terminate, the plaintiff, who has the ultimate burden of proving by a fair preponderance of the evidence that the defendant discriminated against him on the basis of an impermissible factor, may make a *prima facie* case by showing that he was qualified for the position and was terminated under circumstances indicating discrimination on the basis of an impermissible factor. The burden then shifts to the defendant to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was terminated for a legitimate reason. The plaintiff must then prove the reason was not true, but a pretext for impermissible discrimination. While the burden of production shifts once a plaintiff offers a *prima facie* case, the burden of persuasion remains upon the plaintiff at all times. *Doe v. New York University*, 666 F.2d 761, 776 (2d Cir. 1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

rise to an inference of unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Absent direct evidence of discrimination, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), the plaintiff may raise an inference with evidence of disparate treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), or, in the case of a facially neutral policy or requirement that is challenged because it adversely affects handicapped persons, with evidence of adverse impact. *Alexander v. Choate*, 469 U.S. 287 (1985). *Cf., e.g., Woodbury v. New York City Transit Authority*, 832 F.2d 764 (2d Cir. 1987) (reversing judgment for plaintiffs in Title VII and 42 U.S.C. § 1981 case in which plaintiff claimed discriminatory treatment where the court misread statistical evidence and where anecdotal evidence of leniency toward white officers was insufficient to show discriminatory intent); *Warren v. Quality Care Service Corp.*, 603 F. Supp. 1174 (W.D.N.Y. 1985) (granting employer's motion for summary judgment in Title VII and 42 U.S.C. § 1981 case where plaintiff failed to produce any evidence that he was disciplined more severely than similarly situated white employees).

Here, Metro-North argues that Teahan has only claimed to be in a protected group and fails to present any evidence of disparate treatment. Further, Metro-North presents evidence that its decision to terminate Teahan was based on a legitimate, non-discriminatory reason, namely Teahan's excessive absences. Connor Affidavit at ¶¶ 2, 4-6. Viewing the record as a whole, the Court is satisfied that Metro-North has produced evidence of a non-discriminatory reason for terminating Teahan, thereby shifting the burden of production to the plaintiff.

Teahan argues that Metro-North has not shown that he cannot prove disparate treatment and for this reason, the motion should be denied. This assertion is clearly erroneous. Once the burden of production has shifted, the plaintiff must present affirmative evidence from which a jury might return a verdict in plaintiff's favor to survive a summary judgment motion. *Anderson*, 477 U.S. at 256-57. Here, Teahan fails to meet his burden of production. Teahan's assertion that Metro-North knew he had an alcohol and drug problem is insufficient proof of

discriminatory intent to survive a summary judgment motion.[3] Teahan presents no evidence that raises an inference of disparate treatment or impact. Nor does he present evidence that raises an inference that Metro-North's reason for termination was a pretext for discrimination. In fact, Teahan fails to present any affidavits, deposition, or other evidence at all in opposition to Metro-North's motion. By failing to present evidence to rebut Metro-North's case, Teahan fails to raise a genuine issue of material fact regarding discriminatory treatment.

Where a party, who will have the burden of proof at trial, fails to establish an element essential to that party's case, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-23. Teahan fails to establish that he was terminated from the position solely by reason of his handicap, an element essential to his claim. Therefore, Metro-North's motion for summary judgment is granted.

It Is So Ordered.

Dated: New York, New York
March 29, 1991

/s/Mary Johnson Lowe
United States District Judge

[3] There is apparently a dispute as to when Metro-North first learned of Teahan's addiction. By his own admission, Teahan did not tell his supervisors of his addiction until sometime in November or December, 1987. Teahan Deposition at 17, 27. Even assuming Metro-North knew of Teahan's problem at the time of his termination, this is insufficient evidence of discrimination in light of Metro-North's nondiscriminatory reason for termination, and Teahan's failure to meet his burden of producing evidence of pretext.

## APPENDIX D

Section 706(8) provides, in pertinent part:

(C)(i) For purposes of subchapter V of this chapter, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who –

> (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

* * *

(v) For purposes of sections 793 and 794 of this title as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706 (8)(C)(i), (v) (1990).

Section 501 provides, in pertinent part:

**§ 791. Employment of individuals with handicaps**

**(a) Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions**

There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman[1] of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Administrator of Veterans' Affairs, and the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. The Secretary of Education and the Chairman[1] of the Commission shall serve as co-chairpersons of the Committee. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with handicaps, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with handicaps, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

**(b) Federal agencies; affirmative action program plans**

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

29 U.S.C. § 791 (a)-(b) (1990).

Section 503 provides, in pertinent part:

**§ 793. Employment under Federal contracts**

**(a) Amount of contracts or subcontracts; provisions for employment and advancement of qualified individuals with handicaps; regulations**

Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall

implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

29 U.S.C. § 793 (a)(1990).

Section 504 provides, in pertinent part:

**§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations**

**(a) Promulgation of rules and regulations**

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794 (a)(1990).

SPECIAL BOARD OF ADJUSTMENT NO. 934

AWARD NO. 114
DOCKET NO. IBE 88/NY102(D)
J. TEAHAN

*PARTIES TO DISPUTE:*

SYSTEM COUNCIL NO. 7
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

and

METRO-NORTH COMMUTER RAILROAD COMPANY

*STATEMENT OF CLAIM:*

Appeal of dismissal for excessive absences made effective by Notice of Discipline dated April 11, 1988.

*FINDINGS:*

The Board, after Hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by Agreement dated January 1, 1983; that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the Hearing.

Claimant was absent without permission on December 10, 11, and 17, 1987, and was absent from his assigned position on those days as well as on December 18th, when he marked-off but without permission. The record discloses that Claimant did not inform the Carrier on numerous occasions that he would be absent from work. In addition, he was consistently unavailable for bargained for and compensated service. Claimant's attendance record reveals chronic absenteeism for several years, viz. in 1985 he was absent forty eight work days; in 1986 he was absent fifty eight work days; and in 1987 he was absent

fifty three work days. There is no doubt that this constitutes excessive absenteeism, and such conduct is of course particularly detrimental to the Carrier in the railroad industry.

Claimant failed to improve his attendance record after progressive discipline. Notwithstanding the claim to the contrary, Claimant received a fair and impartial trial and was afforded all his rights, privileges and due process. The record indicates that Claimant was in fact absent on the dates in question, and his previous record is not supportive of any request for leniency and certainly cannot mitigate the sanction imposed.

*AWARD:*

The claim is denied.

/s/T. J. Dwyer
T. J. DWYER
Organization Member

/s/Raymond Burney
RAYMOND BURNEY
Carrier Member

/s/Lewis E. Seltzer
LOUIS E. SELTZER
Chairman and Impartial Arbitrator

DATE: